Supreme Court, U. S.
FILED
OCT 3 1980
MICHAEL RODAK, JR., CLERK

80-531

No. .....

# In the Supreme Court of the United States

OCTOBER TERM, 1980

BERENICE T. SCHNEIDER,

Petitioner,

v.

THOMAS D. BOWES, BOWES MANAGEMENT CO., BOWES-ELGIN REALTY CO., BOWES-DUNDEE REALTY COMPANY and ROBERT J. CAMPBELL,

Respondents.

## Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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September 26, 1980

## QUESTIONS PRESENTED

1. Whether respondents should be permitted to invite an error by blocking petitioner's efforts to seek clarification of an ambiguity in the jury verdict before the jury was dismissed (following a five-week trial) and then be rewarded for their effort by obtaining a reversal of the judgment because of the ambiguity in the jury verdict.

2. Should court congestion be exacerbated by encouraging counsel to cause errors in the trial court and then win reversals based on those induced errors.

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No. .....

# In the Supreme Court of the United States

OCTOBER TERM, 1980

BERENICE T. SCHNEIDER,

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v.

THOMAS D. BOWES, BOWES MANAGEMENT CO., BOWES-ELGIN REALTY CO., BOWES-DUNDEE REALTY COMPANY and ROBERT J. CAMPBELL,

Respondents.

## Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in Berenice T. Schneider v. Thomas D. Bowes, Bowes Management Co., Bowes-Elgin Realty Co., Bowes-Dundee Realty Company and Robert J. Campbell, Nos. 78-2606, 78-2607, 78-2759, below.

## OPINIONS BELOW

The opinion of the court of appeals (Appendix A) and the opinion of the court of appeals denying rehearing (Appendix B) are not yet reported. The judgment of the district court (Appendix C) and the jury verdict (Appendix D) are attached hereto.

## JURISDICTION

The judgment of the court of appeals for the ninth circuit was entered on June 30, 1980. A timely petition for rehearing with the suggestion that rehearing be en banc was denied on September 4, 1980, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

## STATEMENT OF THE CASE

The plaintiff in this proceeding and the petitioner herein, Berenice T. Schneider, a widow, was induced by defendants to make a series of substantial investments in several small companies. As a result, plaintiff lost well over one-half million dollars and subsequently brought suit against multiple defendants under the federal securities laws and pendent state claims for material misrepresentations and non-disclosures. Following a five-week jury trial, the jury awarded plaintiff verdicts totaling $471,000 in general damages and $15,000 in punitive damages, separately stating the verdicts as to each defendant (see Appendix D). Prior to the dismissal of the jury, petitioner's counsel attempted to seek clarification of a possible ambiguity in the jury verdict, but his efforts were blocked by respondents and the trial court entered the judgment in the same form as the jury verdict.

On June 30, 1980 the ninth circuit re-

versed petitioner's judgment against respondents on the grounds that the court found that the jury verdict was "hopelessly ambiguous" (Court's Memorandum of Decision, p. 2). The court went on to point out that it was unable to determine what the total amount was that the jury intended to find against defendants (Court's Memorandum of Decision, pp. 3, 4). The court thus focused on the very problem that petitioner's attorney attempted to clarify before the jury was dismissed, only to be blocked from doing so by respondents' objections. A brief summary of the relevant facts are as follows:

SUMMARY OF RELEVANT FACTS.

1. Defendants were sued for securities fraud and common law fraud for multiple events occurring at different times. They were sued both on a conspiracy theory and for independent liability and, accordingly, no joint and several jury instruction was requested by plaintiff, nor was any joint and several instruction requested by defendants.

2. Plaintiff's requested jury verdict form included an interrogatory requesting the jury to state the total amount of any damages it found (Clerk's Transcript, "CT",

pp. 1681-1682), but the court did not use plaintiff's form.

3. During jury deliberations, the jury submitted a note stating that it did not believe it had a verdict form that would permit a mixed verdict (Transcript of Instructions, "TOI", pp. 37-38). The next morning, in light of the jury foreman's question concerning the verdict form, plaintiff's attorney requested that the court submit a question to the jury which asked: "Do you find that plaintiff has been damaged? Please state the total amount of such damages" (TOI, p. 42). Plaintiff's attorney explained to the court that the request for the total amount of damages was necessary because the jury might return a verdict in differing amounts and there would be no way to know if the jury found it was a joint tortfeasor situation as differentiated from independent liability (TOI, pp. 42-43).

4. The court responded that if that happened, "all we have to do is add them up if you recover" (TOI, p. 43). Counsel for Bowes and Campbell remained silent concerning this remark, but both did object to the clarifying question sought by plaintiff

and the court then refused plaintiff's request. Plaintiff then asked that if the jury came back with a split amount that the court ask the jury what the total amount of damages was (TOI, p. 45). The court agreed to wait to see what would happen (TOI, p. 45).

5. The jury then came in with separate verdicts in different amounts as to different defendants (see Appendix D). Before the jury was dismissed, plaintiff's counsel again requested that the court submit the special interrogatory to the jury asking them to state what the total amount of damages was (TOI, p. 57). Defense counsel again objected, the court then indicated, "Do you have an adding machine? We can add these up (TOI, p. 58)." Defense counsel were again silent with regard to the trial court's interpretation of the verdict (TOI, p. 58). The court then excused the jury without submitting the question to the jury.

6. Immediately after the dismissal of the jury, defense counsel began an attack on the jury verdict (TOI, p. 59).

## REASONS FOR GRANTING THE WRIT

### A. THE DECISION BELOW IS IN CONFLICT WITH DECISIONS OF THE NINTH AND THE EIGHTH CIRCUITS AND THE CALIFORNIA SUPREME COURT.

The decision below conflicts with a decision of the ninth circuit, one from

the eighth circuit and decisions of the California Supreme Court concerning the doctrine of invited error and waiver of errors in the form of a jury verdict where defendants did not object to the verdict form prior to the dismissal of the jury.

It has been the clear rule of the ninth circuit since at least 1957 that parties cannot seek a reversal based on errors which they invited. Thus, in Hudson v. Wylie, 242 F.2d 435 (9th Cir., 1957), the ninth circuit stated at page 448:

> "'Parties must abide by the consequences of their own acts and cannot seek a reversal of a case upon appeal for errors which they had committed or invited. One who by his conduct induces the commission of some error by the trial court, or, in other words, who has invited error, is estopped from insisting that the action of the court is erroneous.' 2 Cal. Jur. p. 846."

Similarly, in Arnott v. American Oil Co., 609 F.2d 873 (8th Cir., 1979), the court did not permit a defendant to reverse the judgment based on the form of the verdict where defendants failed to object or seek clarification when the verdicts were ren-

dered. The eighth circuit stated at page 889:

> "Under the circumstances the failure of Amoco to request any instruction or special interrogatories on damages or to make objection to the general verdict form results in a waiver of such objections on appeal. (citations omitted) Amoco also failed to object or seek clarification when the verdicts were rendered and therefore waived objection to the form of the verdict. See Tennessee Consol. Coal Co. v. United Mine Workers, 416 F. 2d 1192, 1200-1201 (6th Cir. 1969), cert. denied, 397 U.S. 964, 90 S.Ct. 999, 25 L.Ed.2d 256 (1970)." (emphasis added)

Finally, as the issues involved are important questions of state law, the decision of the California Supreme Court is highly relevant. In Brown v. Regan, 10 C.2d 519, 524 (1938) the California Supreme Court stated at page 523:

> "It is well established by numerous authorities that when a verdict is not in proper form and the jury is not required to clarify it, any error in said verdict is waived by the party relying thereon who at the time of its rendition

failed to make any request that its informality or uncertainty be corrected."

Further, at page 524, the California Supreme Court stated:

"It creates an abiding conviction that the matter was permitted to stand as originally returned by the jury with the view of thereafter reaping a technical advantage that might result by reason of the situation. We think there is no question that attorney for appellant waived the defect in the verdict, and is estopped to rely upon such defect in the verdict upon this appeal."

(emphasis added)

B. COURT PROTECTIVE RULES.

The doctrine of invited error and waiver of defects in a jury verdict are important court protective rules that, unless enforced, would encourage litigants to invite errors and further increase court congestion by requiring retrials of numerous cases.

In this time of highly congested court calendars, it is more important than ever that litigants not be encouraged to create errors in the hope of reversing a judgment and thereby obtaining a second trial.

## ARGUMENT

Unless the long-standing rule of invited error and its corollary, waiver of defects in a jury verdict not objected to, are enforced, litigants will be encouraged to invite errors and then seek a reversal and a second trial based on their own induced error. Not only does this work a substantial injustice to litigants, but it greatly adds to the already overburdened court system (in this case alone, another five-week trial would be required if the decision of the ninth circuit is not reversed).

## CONCLUSION

For these reasons, the writ of certiorari should issue to review the judgment of the ninth circuit.

Respectfully submitted,
GARY S. ELSTER, A Professional Corporation

Gary S. Elster
Counsel for petitioner

Appendix A

In the United States Court of Appeals
for the Ninth Circuit

Filed--June 30, 1980
Richard H. Deane, Clerk
U. S. Court of Appeals

| | |
|---|---|
| Berenice T. Schneider,<br>Plaintiff/Appellee,<br>v.<br>Thomas D. Bowes, Bowes Management Co., Bowes-Elgin Realty Co., Bowes-Dundee Realty Company,<br>Defendants/Appellants. | No. 78-2606<br>D.C. No. 75-0524-S |
| Berenice T. Schneider,<br>Plaintiff/Appellee,<br>v.<br>Robert J. Campbell,<br>Defendant/Appellant. | No. 78-2607<br>D.C. No. 75-0524-S |
| Berenice T. Schneider,<br>Plaintiff/Appellee,<br>v.<br>Kenneth G. Braid,<br>Defendant/Appellant. | No. 78-2682<br>D.C. No. 75-0524-S |

| | |
|---|---|
| Berenice T. Schneider, Plaintiff/Appellant, v. Thomas D. Bowes, Bowes Management Co., Bowes-Elgin Realty Co., Bowes-Dundee Realty Company, Defendants/Appellees. | No. 78-2759 D.C. No. 75-0524-S MEMORANDUM |

Appeal from the United States District Court of the Southern District of California

Before: ALARCON, NELSON, Circuit Judges, and JAMESON, District Judge.*

These appeals arise out of the collapse of three corporations, The Plastics Group ("TPG"), PPAR Systems ("PPAR"), and Dmytryk-Boyd Productions, Inc. ("Dmytryk"). Plaintiff invested (and lost) several hundred thousand dollars in these enterprises and, as a result, sued those who led her to make these investments for violations of Rule 10b(5) of the Securities and Exchange Commission. Pendent to the 10b(5) claims are actions for common law fraud, conspiracy,

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*Honorable William J. Jameson, Senior United States District Judge, District of Montana, sitting by designation.

and breach of fiduciary duty and confidential relationship.

After a jury trial, three of the defendants were held liable--Bowes, Campbell, and Braid. In addition, the jury awarded Schneider damages against three corporations wholly owned by Bowes. Each appeals the judgment. We reverse the judgment against Braid because of insufficiency of the evidence. We reverse the judgment against Campbell, Bowes, and the corporations, because we find the jury verdict hopelessly ambiguous.

I. Sufficiency of the Evidence

Braid argues that insufficient evidence was introduced against him to warrant the submission of the question of their liability to the jury. We have examined the trial transcript and find the evidence insufficient to support the judgment against Braid. Schneider only alleged Braid's involvement in Dmytryk-Boyd, and did not assert that he had deliberately defrauded her. She did not meet her burden of showing that Braid owed her a legal duty, that he breached this duty, and that she had suffered damages as a result.

II. The Jury Verdict

The trial court must interpret a verdict in light of the pleadings, the evidence and the instructions. If it interprets the verdict incorrectly and the verdict is capable of a correct interpretation, we as an appellate court have the power to make such an interpretation. Mixon v. Riverview Hospital, 62 Cal. Rptr. 379, 389 (App. 1967). Nevertheless, we have no power to make a judgment that does not conform to the intention of the jury. Telles v. Title Insurance & Trust Co., 83 Cal. Rptr. 444, 449 (App. 1969).

From our examination of the jury verdict and the trial transcript, we find the damage award hopelessly ambiguous. In such a case, a reversal is required. Hallinan v. Prindle, 220 Cal. 46 (1934); Mixon v. Riverview Hospital, 62 Cal. Rptr. at 388. The trial court interpreted the jury verdict as a separate judgment against each of the defendants, including the corporate defendants whose liability derives solely from the acts of another defendant. Such an interpretation of the verdict cannot stand, because derivative liability is necessarily

joint and several. See Tri-Delta Engineering, Inc. v. Insurance Co. of North America, 146 Cal. Rptr. 14, 18 (App. 1978). We find it impossible, however, to interpret the verdict, given the record we now have before us. The jury was given no instruction on joint and several liability, and thus it is unclear when they returned with a $77,000 damage award against Bowes and a $76,000 award against each of his corporations, whether the jury intended to find Bowes and his corporations together liable for approximately $76,000, or whether it intended to find them liable for $305,000.

Moreover, it is not clear that when the jury awarded damages of $120,000 against Campbell it found that Campbell had committed separate tortious acts against Schneider and thus was separately liable for the whole amount or whether it found that Campbell had participated in the same tortious acts, in which case the damage award against him should have been joint and several and for the same amount as against Bowes. Of course, some intermediate position would also be possible. We recognize that a jury verdict should stand

whenever any reasonable interpretation of the record will support it, but under the peculiar facts of this case, we find no such interpretation and are therefore constrained to reverse.

III. Issues Affecting the New Trial

Liability of the Bowes Corporations. We note for purposes of the new trial that the jury instruction on the liability of the Bowes Corporations was fatally defective. We find the alter ego instruction defective because it allowed the jury to conclude that the corporations were liable for a tort committed by Bowes without finding an abuse of the corporate form. For a corporation to be liable for the torts of its owner, a plaintiff must show both a unity of interest and ownership such that the separate personalities of the corporation and the individual no longer exist and also that the corporate form itself was employed as a device to perpetrate the fraud. United States v. Standard Beauty Supply Stores, Inc., 561 F.2d 774, 777 (9th Cir. 1977).

The TPG Release. Bowes and Campbell assert that Schneider executed a release

that bars any claim she has for her losses from her investments in TPG and that the District Court committed reversible error in submitting this question to the jury. We note that the submission of this question to the jury by the District Court was not a reversible error. The jury could infer that although Schneider was aware of the losses TPG suffered by the time she executed the release, she erroneously thought that Bowes and Campbell only learned of the financial condition of TPG at the same time she did. The jury could infer that Schneider executed the release against Bowes and Campbell only because she did not know that they had always known the financial condition of TPG and had violated a legal duty to tell her about it. If the release were in fact induced through misapprehension on the part of Schneider caused not by her own neglect but by misconduct by Bowes and Campbell, it would not have been binding. Moore v. Rogers, 157 Cal. App. 2d 192 (1958); see Gelfand v. Tanner Motor Tours, Ltd., 450 F.2d 786, 788 (2d Cir. 1971); Carpenter International, Inc. v. Kaiser Jamaica Corp., 369 F. Supp. 1138, 1143 (D. Del. 1974).

Therefore, the question of the effectiveness of the release was properly submitted to the jury.

IV. Prejudgment Writ of Attachment

If Bowes had been a California resident, the District Court could not have issued a prejudgment writ of attachment against him, because Schneider's action was not for a liquidated amount. Cal. Civ. Proc. Code §§ 537.1 to .2 (repealed 1977). Bowes argues that the writ should not have been issued against him because the California prejudgment writ of attachment statute then in effect treated nonresidents the same as a residents (sic), once they made a general appearance. After studying the legislative history of this act and its successor, see Cal. Civ. Proc. Code § 492.050(c), we agree that the statute does not distinguish between the two, despite the contrary inference that might be drawn from § 537.2. In interpreting the statute, we are mindful that a state cannot treat residents differently from nonresidents without at least some justification. U.S. Const. art. IV, § 2. We therefore conclude that the prejudgment writ of attachment was improperly

issued. We find further that the preliminary injunction requiring Bowes to bring his stock certificates to California and prohibiting his selling or transferring the real property of Bowes-Elgin and Bowes-Dundee was made in aid of the attachment and should therefore be vacated.

V. Schneider's Cross-Appeal

Schneider's cross-appeal is mooted by our reversal of the judgment against Bowes and his corporations. We emphasize again, however, that the corporations are jointly liable for the torts of Bowes, if they are liable at all, regardless of whether an agency theory or an alter ego theory is used.

VI. Conclusion

The judgments against the defendants are reversed. We remand the case to the District Court for a new trial against Bowes, Campbell and the corporate defendants. We also instruct the District Court to vacate the preliminary injunctions and to release the attachments.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Filed--September 4, 1980
Richard H. Deane, Clerk
U. S. Court of Appeals

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|---|---|
| Berenice T. Schneider, Plaintiff-Appellee, v. Thomas D. Bowes, et al, Defendants-Appellants. | No. 78-2606 Consolidated with No. 78-2607 No. 78-2682 No. 78-2759 DC# 75-0524-S |

ORDER

Before: ALARCON and NELSON, Circuit Judges, and JAMESON,* District Judge

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Alarcon and Nelson have voted to reject the suggestion for a rehearing en banc and Judge Jameson has recommended against rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no active judge of the court has requested a

*Honorable William J. Jameson; Senior United States District Judge, District of Montana, sitting by designation.

vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

Filed--February 27, 1978
D. Harris, Deputy Clerk
U.S. District Court
Southern District of California

| | |
|---|---|
| Berenice T. Schneider,<br>Plaintiff,<br>v.<br>Thomas D. Bowes; Bowes Management Company, Inc.; Bowes Dundee Realty Co., Inc.; Bowes Elgin Realty Co., Inc.; Robert J. Campbell; and Kenneth G. Braid,<br>Defendants. | Civil No. C75-0524-S |

JUDGMENT ON JURY VERDICT

The above-entitled cause having come on for trial before the Court and a jury of six, and the issues having been duly tried and the jury having rendered its verdict, NOW, THEREFORE, IT IS

ORDERED AND ADJUDGED that the plaintiff Berenice T. Schneider recover of and from the defendant Thomas D. Bowes the sum of $77,000.00 actual damages and $10,000.00 punitive damages; it is

FURTHER ORDERED AND ADJUDGED that the plaintiff Berenice T. Schneider recover of and from the defendant Bowes Management Company, Inc. the sum of $76,000.00; it is

FURTHER ORDERED AND ADJUDGED that the plaintiff Berenice T. Schneider recover of and from the defendant Bowes Dundee Realty Co., Inc. the sum of $76,000.00; it is

FURTHER ORDERED AND ADJUDGED that the plaintiff Berenice T. Schneider recover of and from the defendant Bowes Elgin Realty Co., Inc. the sum of $76,000.00; it is

FURTHER ORDERED AND ADJUDGED that the plaintiff Berenice T. Schneider recover of and from the defendant Robert J. Campbell the sum of $126,000.00 actual damages and $4,000.00 punitive damages; it is

FURTHER ORDERED AND ADJUDGED that the plaintiff Berenice T. Schneider recover of and from the defendant Kenneth G. Braid the sum of $40,000.00 actual damages and $1,000.00 punitive damages; it is

FURTHER ORDERED AND ADJUDGED that the defendant Thomas D. Bowes take nothing by his counter-claim and that he go hence without day; it is

FURTHER ORDERED that the parties shall

bear their own cost of action expended herein.

Dated this 27th day of February, 1978.

Signed: Ewing T. Kerr

U. S. District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

| | |
|---|---|
| Berenice T. Schneider,<br>Plaintiff,<br>v.<br>Thomas D. Bowes; Bowes Management Company, Inc.; Bowes Dundee Realty Co., Inc.; Bowes Elgin Realty Co., Inc.; Robert J. Campbell; and Kenneth G. Braid,<br>Defendants. | Civil No. C75-0524-S |

V E R D I C T

We, the jury duly empaneled in the above-entitled matter, upon the issues joined, do find generally for the plaintiff and against the defendants and assess her damages as follows:

| | DAMAGES | PUNITIVE DAMAGES |
|---|---|---|
| THOMAS D. BOWES | $77,000.00 | $10,000.00 |
| BOWES MANAGEMENT COMPANY, INC. | $76,000.00 | None |
| BOWES DUNDEE REALTY CO., INC. | $76,000.00 | None |
| BOWES ELGIN REALTY CO., INC. | $76,000.00 | None |

| | | |
|---|---|---|
| ROBERT J. CAMPBELL | $126,000.00 | $4,000.00 |
| KENNETH G. BRAID | $40,000.00 | $1,000.00 |

February 6, 1978 /s/ John P. Snodgrass
Foreman

Supreme Court, U. S.
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*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.**

## Brief of Respondents Thomas D. Bowes, Bowes Management Co., Bowes-Elgin Realty Co., and Bowes-Dundee Realty Company, In Opposition

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*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.**

## Brief of Respondents Thomas D. Bowes, Bowes Management Co., Bowes-Elgin Realty Co., and Bowes-Dundee Realty Company, In Opposition

Respondents, Thomas D. Bowes, Bowes Management Co., Bowes-Elgin Realty Co., and Bowes-Dundee Realty Company pray that Berenice T. Schneider's Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit be denied.

## Summary of Argument.

Contrary to petitioner's suggestion, the Ninth Circuit Court of Appeals did not mention the doctrine of invited error or waiver of defects in a jury verdict in its memorandum decision. Because there is no rational basis for a writ of certiorari to be granted, the petition is frivolous and damages should be granted these respondents.

## ARGUMENT

### I.

### There Is No Basis upon Which This Petition for Writ of Certiorari Should Be Granted.

Berenice T. Schneider's Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit is frivolous. Only an imaginative and contorted reading of the Ninth Circuit's memorandum decision enables Schneider to present even a colorable claim that the requested writ should be granted.

Petitioner argues that the Ninth Circuit's memorandum decision is in conflict with decisions of its own and with decisions of the Eighth Circuit with respect to the "doctrine of invited error and waiver of errors in the form of a jury verdict." Petition for Certiorari at 7. The Ninth Circuit's memorandum decision neither discusses nor mentions these issues. The specific holding of the Ninth Circuit Court was, "We reverse the judgment against Campbell, Bowes, and the corporations, because we find the jury verdict hopelessly ambiguous." Appendix A to Petition for Certiorari at 3. Continuing, the court said,

> From our examination of the jury verdict and the trial transcript, we find the damage award hopelessly ambiguous. In such a case, a reversal is required. . . . The trial court interpreted the jury verdict as a separate judgment against each of the defendants, including the corporate defendants whose liability derives solely from the acts of another defendant. Such an interpretation of the verdict cannot stand, because derivative liability is necessarily joint and several. [Citations omitted.]

Appendix A to Petition for Certiorari at 4-5.

Nowhere does petitioner challenge this legal analysis. Rather, this petition for certiorari is predicated upon a conjured factual scenario, a scenario never accepted by the lower courts. It is this strawman against which petitioner tilts. Such a ploy highlights the frivolous nature of this petition. There is no legal error for this Court to review. None of the criteria of Supreme Court Rule 17 are even implicated.

The Ninth Circuit, after thoroughly analyzing the record in this case, has properly applied the law. Petitioner nowhere disputes this. Rather, petitioner merely wishes for different facts so that a different rule of law could be applied. In other words, petitioner would transform this Court into merely another tribunal of errors and appeals, contrary to its constitutional mission. As stated by Mr. Justice Holmes on behalf of the Supreme Court: "We do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). Petitioner's strawman strategem runs counter to the very essence of the function of this Court and exposes the frivolous nature of this petition.

Even assuming for purposes of argument that the Ninth Circuit did decide an issue relating to the doctrine of invited error and waiver of defects in a verdict, it did not discuss such issues in its memorandum. Thus, the presumption is that the court applied the correct law, not that it created a new rule of law which puts it in conflict with other circuit courts of appeals. *See Walling v. Jacksonville Paper Co.*, 317 U.S. 565, 569-570 (1943); *Berenter v. Staggers*, 362 F.2d 971, 972 n.2 (D.C. Cir. 1966).

Such a presumption has even greater validity when taken in conjunction with the fact that the decision of the Ninth Circuit was a Memorandum rather than an Opinion. In such an instance, the court's decision is not intended for publication and "shall not be regarded as precedent and shall not

be cited to or by [the Ninth Circuit] court or any district court of the Ninth Circuit. . . .'' *See* Rules of the United States Court of Appeals for the Ninth Circuit, Rule 21 set out in full in Appendix A hereto.

Thus, the assertion of a conflict among various courts as a result of this decision is fallacious. Again, the frivolity of this petition is obvious.

II.

**Because Schneider's Petition Is Frivolous, Damages Should Be Assessed on Behalf of These Respondents.**

Petitioner has come before this Court with a patently frivolous petition for writ of certiorari. Supreme Court Rule 49.2 provides that: ''When an appeal or petition for writ of certiorari is frivolous, the Court may award the appellee or the respondent appropriate damages.'' This rule should be applied to the instant petition.

It is difficult to conceive of a more frivolous petition than the instant one. The sole predicate for this petition is the strawman averments raised by petitioner. In short, the petition contains nothing of substance. Damages should be granted respondents for the pains incurred in responding to this frivolous petition.

Damages are particularly appropriate given that this is not the first time that this litigant has abused the judicial process to multiply proceedings and harass respondents in this action. As the Ninth Circuit explicitly held, petitioner improperly procured a prejudgment writ of attachment against respondent Bowes and further improperly procured a preliminary injunction which further infringed upon that respondent's rights to his property. Appendix A to Petition for Certiorari at 8-9.

This Court has continually expressed its disapproval of litigants who needlessly multiply and delay judicial proceedings. *See Roadway Express, Inc. v. Piper*, 100 S.Ct. 2455 (1980). Moreover, this Court has long since noted that "the only way to discourage frivolous appeals and writs of error is by the use of our power to award damages. . . ." *Whitney v. Cook*, 99 U.S. 607 (1879). Because the instant petition can be characterized only as frivolous, damages should be awarded to respondents.

Respondents should be awarded damages in the amount of One Thousand Five Hundred Dollars ($1,500.00). Such an amount would fairly compensate respondent for the expenditures incurred in responding to the instant frivolous petition. As stated in *Furbee v. Vantage Press, Inc.*, 464 F.2d 835, 837 (D.C. Cir. 1972): "Justice. . . . requires that the costs of this appeal, including the expense of printing Appellee's brief, and reimbursement for reasonable attorney's fees, be awarded. . . . ." *Cf.*, Advisory Committee Notes to Rule 38 of the Federal Rules of Appellate Procedure (Appellate Rule extremely similar to Supreme Court Rule 49.2 has been authoritatively construed to provide for awarding of costs and attorney's fees). Damages should be granted to these responding parties.

**Conclusion.**

Because of the frivolous nature of Schneider's petition for a writ of certiorari, her petition should be denied and damages should be granted these respondents in the sum of $1,500.00.

DATED: October 30, 1980.

Respectfully submitted,

KENNETH L. KING,

*Attorney for Respondents Thomas D. Bowes, Bowes Management Co., Bowes-Elgin Realty Co., and Bowes-Dundee Realty Company.*

## APPENDIX A.

RULE 21. Form and Publication of Disposition of Cases.

(a) Opinions, Memoranda, Orders; Publication. Each written disposition of a matter before this court shall bear under the number in the caption an appropriate label, that is, OPINION, MEMORANDUM, or ORDER.

A written reasoned disposition of a case which is intended for publication is an OPINION of the Court. It may be an authored opinion or a per curiam opinion. A written reasoned disposition of a case which is not intended for publication is a MEMORANDUM. Any other disposition of a matter before the Court is an ORDER. An ORDER or MEMORANDUM shall not reveal its author, nor shall its authorship be designated "Per Curiam."

PUBLICATION means making available for reporting by legal publishing companies, or for distribution to regular subscribers, written disposition which have been printed as slip opinions, or copies of which have been prepared by any other means.

Publication as a matter of course shall apply only to opinions.

(b) When Disposition to be by Opinion. Subject to subsection (d) hereof, a case shall not be disposed of by written opinion for publication unless it:

(1) Establishes, alters, modifies or clarifies a rule of law, or

(2) Calls attention to a rule of law which appears to have been generally overlooked, or

(3) Criticizes existing law, or

(4) Involves a legal or factual issue of unique interest or substantial public importance, or

(5) Relies in whole or in part upon a reported opinion in the case by a district court or an administrative agency, or

(6) Is accompanied by a separate concurring or dissenting expression, and the author of such separate expression desires that it be reported or distributed to regular subscribers.

(c) Disposition as Precedent. A disposition which is not for publication shall not be regarded as precedent and shall not be cited to or by this court or any district court of the Ninth Circuit, either in briefs, oral argument, opinions, memoranda, or orders, except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel.

(d) Designation for Publication. A disposition other than an opinion may be specially designated for publication by a majority of the judges acting and when so published may be used for any purpose for which an opinion may be used. Such a designation should be indicated at the end of the disposition when filed with the Clerk by the addition of the words "For Publication" on a separate line.

(e) Preliminary Determination to Publish. The preliminary determination whether the disposition should be published should be made at the first conference following oral argument, or if the disposition is made without oral argument, before it is filed with the Clerk.

(f) Request for Publication. Publication of any unpublished disposition may be requested by letter addressed to the Clerk, stating concisely the reasons for publication. Such a request will not be entertained unless received within 60 days of the issuance of this court's disposition.

(g) Periodic Notice to Publishing Companies. A list of all cases that have been decided by written unpublished disposition will be made available periodically to legal publishing companies for publication. The list shall include a notation as to the concluding disposition in each case, such as, e.g., "Affirmed," "Reversed," "Dismissed," or "Enforced."

NO. 80-53 1

IN THE

# Supreme Court of the United States

October Term, 1980

BERENICE T. SCHNEIDER,

*Petitioner.*

*vs.*

THOMAS D. BOWES, BOWES MANAGEMENT CO., BOWES-ELGIN REALTY CO., BOWES-DUNDEE REALTY COMPANY and ROBERT J. CAMPBELL,

*Respondents.*

## RESPONDENT ROBERT J. CAMPBELL'S BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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NO. 80-53

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

BERENICE T. SCHNEIDER,

*Petitioner,*

*vs.*

THOMAS D. BOWES, BOWES MANAGEMENT CO., BOWES-ELGIN REALTY CO., BOWES-DUNDEE REALTY COMPANY and ROBERT J. CAMPBELL,[1]

*Respondents.*

# RESPONDENT ROBERT J. CAMPBELL'S BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[1]The United States Court of Appeals for the Ninth Circuit reversed a $40,000 judgment against Kenneth G. Braid, a defendant-appellant below, finding that there was no evidence to support the verdict.

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Hudson v. Wylie (9th Cir. 1957), 242 F.2d 435 ..... 3

# RESPONDENT ROBERT J. CAMPBELL'S BRIEF IN OPPOSITION

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## STATEMENT OF THE CASE

Plaintiff, petitioner in this action, sued sixteen defendants alleging facts and circumstances surrounding nine different business transactions, each of which transaction involved several of the defendants.

After a trial of approximately five weeks, the jury found for plaintiff and against six defendants (the six remaining).

Defendants appealed the decision of the trial court to the United States Court of Appeals for the Ninth Circuit. At the time of oral argument the justices of the appellate court freely questioned counsel regarding the facts and issues of the case, making it abundantly clear that the court was thoroughly familiar with the briefs which counsel had filed as well as with the court reporter's transcript (in excess of 3,000 pages).

The appellate court reversed the $40,000 judgment against Kenneth G. Braid, finding that there was no evidence to support the verdict.

The appellate court found the jury verdict hopelessly ambiguous, reversed judgment against respondents, and granted a new trial.

In granting the new trial the appellate court noted, "We recognize that a jury verdict should stand whenever any reasonable interpretation of the record will support it, but under the peculiar facts of this case, we find no such interpretation and are therefore constrained to reverse."

On appeal the issue of "invited error" was briefed, argued, and obviously rejected by the appellate court.

Petitioner now brings on this petition for a writ of certiorari to again raise the issue of invited error.

## SUMMARY OF ARGUMENT

Petitioner argues that there was "invited error" as to the jury verdict in that respondents objected to plaintiff's efforts to seek clarification of the jury verdict. A reading of the record (TOI 57, 58), a copy of which is attached hereto as Exhibit A, clearly shows no such objections (in fact, counsel for respondent sought clarification of the verdict, which request was denied by the trial court).

Petitioner also asserts that there is "a conflict between the circuits," but a reading of the case from the Eighth Circuit Court of Appeals shows that it is in concert with the instant case and, thus, no conflict exists.

## ARGUMENT

### 1. There was no invited error as to the jury verdict.

Petitioner asserts that after the jury returned its verdict defense counsel opposed plaintiff's efforts to clarify the verdict. It is respectfully submitted that the petitioner misstates the record. A reading of the petitioner's reference to TOI 57, 58 (Exhibit A attached) shows that it was counsel for respondent Robert J. Campbell who made the first effort to clarify the verdict. The trial judge denied

both this request as well as the subsequent request of plaintiff for clarification. Immediately after the court's denial of the efforts to clarify the verdict plaintiff requested to be excused to interrogate the jury. This request was also denied by the trial court.

Contrary to petitioner's interpretation of the record, respondent made no objection to petitioner's attempt to clarify the jury verdict.

It is submitted from the foregoing that there was no invited error.

## 2. Petitioner's authorities do not support the theory of "a conflict between the circuits."

Petitioner's theory that there is a conflict between the circuits is not supported by a close reading of the cases.

Petitioner first cites the case of *Hudson v. Wylie* (9th Cir. 1957), 242 F.2d 435, a bankruptcy case, where the issue allegedly in point is concerned with the erroneous exclusion of key evidence on motion of appellant. Appellant seeks to assign this exclusion as reversible error but fails. Clearly, the issues in *Hudson* do not deal with ambiguities in verdicts or, as alleged by petitioner, respondents' objections to petitioner's inquiries: thus, *Hudson* is not in point with the instant case.

Petitioner next cites the case of *Arnott v. American Oil Co.* (8th Cir. 1979), 609 F.2d 873, but this case also does not deal with the issue of "invited error." In *Arnott* the jury awarded Arnott $100,000 in general damages. One of the causes of action alleged a violation of the anti-

trust laws and based thereupon the trial court trebled the damages. On appeal appellant alleged that the verdict was ambiguous. The appellate court, after discussing waiver and estoppel, agreed in part with appellant and concluded that since there was a general verdict and it was impossible to tell if the jury meant to include or exclude the anti-trust cause of action, then the trial court should not have trebled the damages. The appellate court affirmed the verdict on condition that a remittitur (of all in excess of $100,000) be filed. It is clear from a reading of the case that if appellee did not file the remittitur, then a new trial would be granted.

In *Arnott* the verdict was found to be ambiguous and could only be saved by remittitur. In the instant case the verdict was found to be "hopelessly ambiguous" and could not be saved. It is submitted that there is nothing to clarify between the decision of the Eighth Circuit in *Arnott* and the case presently before this Court.

The last case which petitioner cites is *Brown v. Regan* (1938), 10 Cal. 2d 519, a case decided by the California Supreme Court. It is not clear how *Brown* is relevant to the issue of "a conflict between the circuits," but *Brown* is also distinguishable from the within case.

In *Brown,* a personal injury suit relating to a car accident, the jury brought back a verdict of "nothing dollars" against the driver and $1,000 against the owner of the car. The appellate court noted that "the proper procedure where an informal or insufficient verdict has been returned is for the trial court to require the jury to return for further deliberation." In *Brown* the attorney for the owner vigorously opposed efforts of plaintiff's

attorney to seek clarification and, based thereupon, it was found that the owner was to be liable for the $1,000.

*Brown* is clearly not in point with the instant case as there is no showing whatsoever in the instant case that respondent objected to clarification of the jury verdict.

## CONCLUSION

From the foregoing it is clear that the holding of the Eighth Circuit Court of Appeals and the case before this Court are in concert and, thus, there is no conflict between the circuits.

In addition, petitioner has been less than forthright with the Court in that a plain reading of the post-verdict transcript indicates that respondent's counsel sought a clarification of the jury verdict and that, contrary to petitioner's representations, there were no objections by respondents or any other defendants to petitioner's attempt to clarify the jury verdict.

It is submitted that the petition for writ of certiorari is frivolous and without any merit whatsoever and should be denied and that respondent should recover costs, including reasonable attorney's fees for opposing the petition.

Respectfully submitted,

JOSEPH E. STALDER

*Attorney for Respondent*
*Robert J. Campbell*

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[TOI 57]

Thank you very much for the time and attention that you have given this matter.

MR. CONDRA: Your Honor --

MR. STALDER: Your Honor, may I inquire, though, as to what time frame the damages were to be established in? In other words, as against Mr. Campbell, for instance, whether or not the damages were assessed for the time period prior to July 26, 1973?

THE COURT: No, that wasn't on the verdicts. I think the verdicts speak for themselves.

THE CLERK: Your Honor, are the judgments to be prepared by Plaintiff?

MR. ELSTER: Your Honor, may I inquire as to the one special interrogatory requested the Court give before the verdict that they now be requested at this point as to the total damages the jury found?

THE COURT: I don't understand you.

MR. ELSTER: The one that I submitted to Your Honor this morning.

THE COURT: I can't read it. What was it?

MR. ELSTER: May I present it to Your Honor?

THE COURT: I can't submit a verdict after a case is gone to the jury.

MR. ELSTER: It was only as to the total damages, Your Honor.

[TOI 58]

MR. CONDRA: The Court answered counsels inquiry in Chambers this morning.

THE COURT: Do you have an adding machine? We can add these up as to the interest. Interest is denied.

Very well.

You are excused until further notice.

(Jury panel excused.)

(The following proceedings commenced out of the presence of the jury.)

MR. ELSTER: Your Honor, may I be excused to see if any of the jurors wish to discuss this with me?

THE COURT: No, sir. That's a rule of this Court, that counsel cannot interrogate the jurors.

MR. ELSTER: I didn't mean to interrogate them, if any of them wanted to discuss it.

THE COURT: Or what went on in the jury room. That is Rule 23 of this Court.

MR. ELSTER: I didn't know that.

On the issues of preparation of the judgment --

THE COURT: I usually draw them myself. I will draw them and file them. I won't do it until I get home.

I think we will finish this other case by noon tomorrow. If you have any motions you want to make tomorrow

# DECLARATION OF SERVICE BY MAIL

STATE OF CALIFORNIA )
) ss.
County of Orange )

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, State of California, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 326½ Main Street, Huntington Beach, California 92648, that on OCTOBER , 1980, I served the within RESPONDENT ROBERT J. CAMPBELL'S BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (Schneider v. Bowes) on the following named parties by depositing three copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California, addressed to said parties at the addresses as follows:

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Attorney for Plaintiff/Petitioner

I declare under penalty of perjury that the foregoing is true and correct.

Executed on OCTOBER 28, 1980, at HUNTINGTON BEACH, CALIFORNIA.

D. A. Standefer

41 Copies to United States Supreme Court, Washington, D. C.

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